

MAY 7 1990

JOSEPH E. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

TIMOTHY SMITH, PETITIONER

Versus

STATE OF LOUISIANA, RESPONDENT

**ON PETITION FOR A WRIT OF
CERTIORARI TO THE FOURTH CIRCUIT
COURT OF APPEAL, STATE OF LOUISIANA
RESPONDENT'S BRIEF IN OPPOSITION**

**HARRY F. CONNICK
DISTRICT ATTORNEY
PARISH OF ORLEANS
STATE OF LOUISIANA**

**JACK PEEBLES
ASSISTANT DISTRICT ATTORNEY
COUNSEL OF RECORD
619 South White Street
New Orleans, Louisiana 70119
(504) 822-2414**

COUNSEL FOR RESPONDENT

BEST AVAILABLE COPY



TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	i
Reasons for Denying the Writ	1
Conclusion	4
Certificate of Service	4

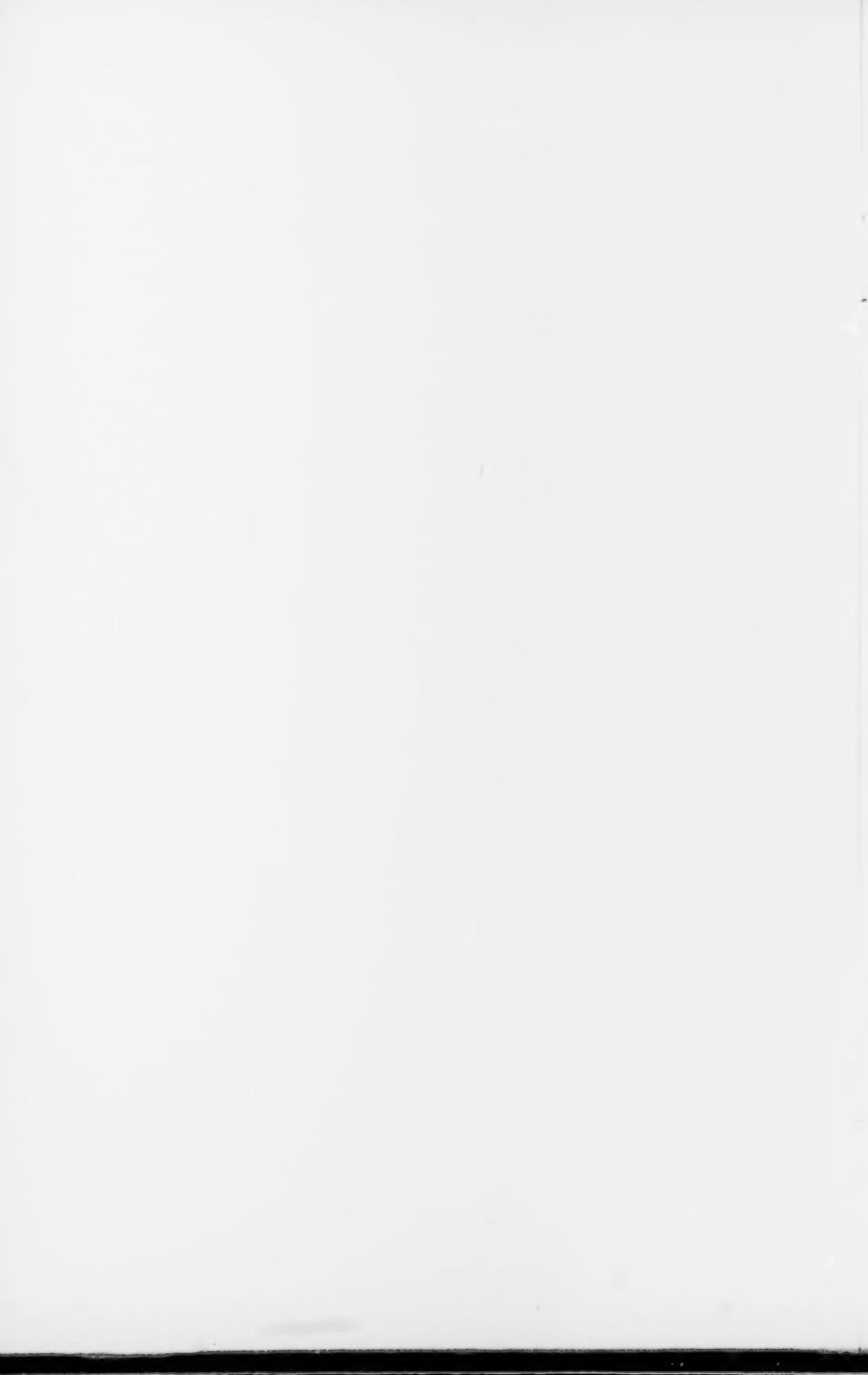
TABLE OF AUTHORITIES

Cases

<i>Hamling v. U.S.</i> , 418 U.S. 87, 94 S.Ct. 2887 (1974), reh. den. 419 U.S. 885, 95 S.Ct. 157	3
<i>New York v. P. J. Video, Inc.</i> , 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986)	2
<i>State ex rel. Ross v. Blackburn</i> , 403 So.2d 719 (La. 1981)	2

Articles, Statutes, and Constitutional Provisions

La. Code of Crim. Proc. Arts. 801 and 841	2
---	---



NO. 89-1300

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TIMOTHY SMITH, PETITIONER

Versus

STATE OF LOUISIANA, RESPONDENT

**ON PETITION FOR A WRIT OF
CERTIORARI TO THE FOURTH CIRCUIT
COURT OF APPEAL, STATE OF LOUISIANA**

RESPONDENT'S BRIEF IN OPPOSITION

MAY IT PLEASE THE COURT:

The respondent, State of Louisiana, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Fourth Circuit Court of Appeals for the State of Louisiana. That opinion is reported at 543 So.2d 555 (1989).

The facts of the case are adequately set out in the opinion of the Fourth Circuit (see petitioner's appendix, a-3, et seq.).

REASONS FOR DENYING THE WRIT

Comment is here offered to each of the five questions posed by petitioner:

- (1) "The trial court erred in not granting defendant's requested jury charges and the jury applied improper standards."

Petitioner's failure to contemporaneously object to the court's charge, or to suggest additional charges at the conclusion of the evidence, precludes the assertion of this error on appeal. See: Opinion below, pet. appendix, p.4; *State ex rel. Ross v. Blackburn*, 403 So.2d 719 (La. 1981); La. Code of Crim. Proc. Arts. 801 and 841.

Petitioner argues that the jury applied improper standards to the film. As the Fourth Circuit pointed out, the jury instructions prohibited the jurors from basing their verdict on personal values (opinion, app. 5). The jury was not instructed to rely upon personal values. There is no reason to conclude that the jury did base its determination on personal values. No substantial question is presented here.

- (2) "The search warrant issued in this matter was not properly sought or applied for and the court erred in not granting defendant's motion to suppress."

No substantial federal question is presented here. Petitioner's argument that the Magistrate must have an opportunity to evaluate the film as a whole before issuing a warrant is not supported by the decisions of this Court. See: *New York v. P. J. Video, Inc.*, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986).

(3) "The trial court erred in not ordering the prosecution to comply with requested defense discovery."

Petitioner's request for a listing of persons who viewed the film and found it obscene, and for a listing of all persons arrested for obscenity during the past year, was properly denied. No federal question is presented by the affirmance of the trial court's denial of an order that the state produce this information.

(4) "Appellant was denied a fair and impartial trial due to the prosecution's summary recusal of all potential male jurors."

This question is one of fact, which was resolved against petitioner by the Fourth Circuit (app., p. 10). The facts found by the court are not clearly error. No federal question is presented.

(5) "The court erred in failing to grant the motion to quash."

Petitioner here complains that the trial court did not quash the bill of information, which petitioner contends is vague, ambiguous, and fails to specifically allege financial gain or that the film arouses prurient interest.

This claim was considered by the Fourth Circuit and that court held, in accord with the jurisprudence of this court, that the bill of information adequately charged petitioner. Pet. appendix, p. 9; *Hamling v. U.S.*, 418 U.S. 87, 94 S.Ct. 2887 (1974), reh. den. 419 U.S. 885, 95 S.Ct. 157.

This decision is not in conflict with federal jurisprudence.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK PEEBLES,
Assistant District Attorney
Parish of Orleans
619 South White Street
New Orleans, Louisiana 70119
Tele: (504) 822-2414
Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that a copy of this Respondent's Brief in Opposition has been served upon counsel for petitioner by placing a copy in the United States Mail, postage prepaid and properly addressed to:

Robert H. Belknap
Attorney at Law
631 St. Charles Avenue
New Orleans, LA 70130

New Orleans, Louisiana,

this 7th day of May, 1990.

Jack Peebles *cc*
JACK PEEBLES,
COUNSEL FOR RESPONDENT

